

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

11 **JUSTIN MERRIMAN,**

12 Plaintiff,

13 v.

14 **OFFICER TIERNEY, OFFICER**
15 **ROBINSON, DOES 1 to 50,**

16 Defendants.

17 Case No. C 15-01715 WHA (PR)

18 **~~[PROPOSED]~~ ORDER GRANTING**
19 **JOINT MOTION TO FIND PLAINTIFF**
20 **INCOMPETENT & RECOMMENDING**
21 **B. EPSTEIN FOR APPOINTMENT AS**
22 **PLAINTIFF'S GUARDIAN AD LITEM**

23 Defendant S. Robinson and Plaintiff Justin Merriman jointly move for this Court to find
24 Plaintiff incompetent under Federal Rule of Civil Procedure 17 and to appoint attorney Bette
25 Epstein as Plaintiff's Guardian Ad Litem. Defendant Tierney does not oppose the motion. For
26 the reasons identified below, the motion is granted.

27 **DISCUSSION**

28 Rule 17 concerns a party's competence to participate in civil proceedings. *See* Fed. R. Civ. P. 17. The purpose of the rule is to protect an incompetent person's interests in prosecuting or defending a lawsuit. *See Davis v. Walker*, 745 F.3d 1303, 1310 (9th Cir. 2014) (citing *Gardner v. Parson*, 874 F.2d 131, 140 (3d Cir. 1989)). A party's capacity to sue is determined by the law of

1 his domicile. *AT&T Mobility, LLC v. Yeager*, 143 F.Supp.3d 1042, 1050 (E.D. Cal. 2015) (citing
 2 Fed. R. Civ. P. 17(b)(1)) (“*AT&T Mobility*”). The test for incompetence to sue under California
 3 law is “whether the party has the capacity to understand the nature or consequences of the
 4 proceeding, and is able to assist counsel in preparation of the case.” *Lee v. Retail Store Employee*
 5 *Bldg. Corp.*, 2016 WL 4191654, at *3 (N.D. Cal. Aug. 9, 2016) (quoting *In re Jessica G.*, 113
 6 Cal.Rptr.2d 714, 718 (Ct. App. 2001)); *accord AT&T Mobility*, 143 F.Supp.3d 1050 (quoting
 7 *Golden Gate Way, LLC v. Stewart*, 2012 WL 4482053, at *2 (N.D. Cal. Sept. 28, 2012)). The
 8 Court may consider a broad range of evidence concerning “whether the person in question is able
 9 to meaningfully take part in the proceedings.” *AT&T Mobility*, 143 F.Supp.3d at 1050 (quoting *In*
 10 *re Christina B.*, 19 Cal.App.4th 1441, 1450 (1993)). This evidence includes government reports,
 11 medical records, the representations of counsel, medical diagnoses, and the Court’s own
 12 observations. *See id.* (collecting cases).

13 If a court determines that a party is incompetent to prosecute a law suit under applicable
 14 state law, and if that party is not represented by an appointed representative, Rule 17 empowers
 15 the court to appoint a representative to protect an incompetent person’s interests in the litigation.
 16 *See Davis*, 745 F.3d at 1310 (citing *Gardner*, 874 F.2d at 140 (3d Cir. 1989)). Once appointed, a
 17 guardian possesses “authority to engage counsel, file suit, and to prosecute, control and direct the
 18 litigation.” *AT&T Mobility*, 143 F.Supp.3d at 1052 (quoting *Noe v. True*, 507 F.2d 9, 12 (6th Cir.
 19 1974) (per curiam)) (internal quotations and citations omitted).

20 Here, the Court has reviewed a copy of the report prepared by Dr. Anna Glezer outlining
 21 Plaintiff’s mental-health, diagnosing him as a paranoid schizophrenic.¹ The report explains that
 22 Plaintiff’s decisions are heavily influenced by his delusion and hallucinations, and that Plaintiff
 23 cannot differentiate between fact and fiction. Dr. Glezer’s report also expresses doubt that
 24 Plaintiff’s mental health will substantially improve with additional treatment.

25 On the basis of this report, the diagnosis contained therein, and the representations of
 26 counsel, the Court finds Plaintiff incompetent to meaningfully take part in these proceedings.

27 ¹ Dr. Glezer’s diagnosis confirms an earlier diagnosis of Plaintiff’s condition by officials
 28 at San Quentin State Prison.

1 Accordingly, Plaintiff lacks capacity to maintain this suit without a representative under Rule 17.

2 *See AT&T Mobility*, 143 F.Supp.3d at 1050.

3 The parties have jointly recommended Ms. Epstein for appointment as Plaintiff's Guardian
4 Ad Litem. Ms. Epstein's impressive qualifications, including previous guardianship experience,
5 leave the Court with no doubt that she will provide Plaintiff with excellent representation. On
6 that basis, this Court appoints Bette Epstein to serve as Plaintiff's Guardian Ad Litem for the
7 remainder of these proceedings or until this Court enters a contrary order.

8 IT IS SO ORDERED

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10 Dated: December 8, 2016.


The Honorable William Alsup

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